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Summary record of the 936th meeting

Held at Headquarters, New York, on Monday, 25 June 2012, at 3 p.m.

Acting Chair: Mr. Wiwen-Nilsson (Vice-Chair of the Commission, Chair of Working Group I) . . . (Sweden)

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Mr. Wiwen-Nilsson (Sweden), Vice-Chair of the Commission, Chair of Working Group I (Procurement), took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/745 and A/CN.9/WG.I/WP.79/Add.2, Add.7, Add.9, Add.10, Add.13, Add.15 and Add.18)

1. **The Chair** invited the Commission to resume its consideration of the draft revised Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

2. **Mr. Wallace** (United States of America) recalled that a proposal had once been made to consolidate at least the executive summaries of each chapter of the Guide in all six languages in order to facilitate the work of the Commission. Given the Guide's daunting length, such a document might be useful for end-users as well, and he would appreciate the secretariat's views on the matter. It was imperative to ensure that the Guide was user friendly.

3. **Ms. Nicholas** (Secretariat) said that the executive summaries and the very short description of the objectives found in the preamble had been consolidated, but in English only. Insofar as its length was concerned, as a reference document targeting three groups — legislators, regulators and central bodies providing guidance to users of the Model Law — the Guide was not intended to be read in full by any one group. Moreover, the Working Group envisaged it primarily as an electronic document that readers would access swiftly and easily at need as a series of much shorter statements. The Commission would discuss the issue of whether or not to provide a print version of the Guide once it had finished its consideration of the text.

Preamble and chapter I of the Model Law (*continued*)

4. **The Chair**, replying to a query from **Mr. Fruhmann** (Austria), confirmed that an explanation of the meaning and historic context of the phrase "fair, equal and equitable" would be added to document A/CN.9/WG.I/WP.79/Add.2, in section 4 of the text relating to the preamble.

5. **Ms. Nicholas** (Secretariat), also replying to a query from **Mr. Fruhmann** (Austria), said that it had been decided not to include a glossary in the Guide, which meant that there would not be hyperlinks to one in the text. References to the glossary would be appropriately revised, and the secretariat would draw up an informal glossary at a later date.

6. **The Chair** reminded the secretariat that, as an aide to comprehension only, the glossary must not contain substantive provisions. He took it that, as there were no further comments, the Commission approved the Working Group's proposed changes to document A/CN.9/WG.I/WP.79/Add.2, on the understanding that it would contain a discussion of collusion, an explanation of the meaning and history of the concept of "fair, equal and equitable" and revised references to the glossary.

Chapter II, Part I

7. **The Chair** said that, in the absence of comments, he took it that the Commission approved the Working Group's proposed changes to document A/CN.9/WG.I/WP.79/Add.7 on the Model Law's provisions on methods of procurement.

Chapter IV

8. **Ms. Nicholas** (Secretariat), referring to document A/CN.9/WG.I/WP.79/Add.9 on the Model Law's provisions on restricted tendering and requests for quotations, drew the Commission's attention to paragraph 20, which dealt with ensuring objectivity in selecting suppliers in the case of direct solicitation. The Working Group had agreed that it should mention another objective method of selection — rotation — and should clarify what was meant by "non-selection per se".

9. **The Chair** took it that the Commission approved the Working Group's proposed changes to document A/CN.9/WG.I/WP.79/Add.9.

Chapter V

10. **Ms. Nicholas** (Secretariat) said that the Working Group had agreed to modify paragraph 11 of document A/CN.9/WG.I/WP.79/Add.10 on the Model Law's provisions on methods of tendering involving procuring entity-supplier interaction, to indicate that appropriate institutional frameworks and safeguards were necessary to allay suppliers' concerns about elevated risks of corruption in the context of requests for proposals with dialogue.

11. **Mr. Grand d'Esnon** (France) was surprised at the proposed addition. As discussed many times, there was no evidence that requests for proposals with dialogue were more prone to corruption than other chapter V methods. In any event, the French delegation firmly opposed to the use of the word "corruption".

12. **Mr. Wallace** (United States of America) said that the term "corruption" was insulting and gratuitously discredited requests for proposals with dialogue. Problems with that method stemmed from a lack of experience in implementing it.

13. **Mr. Imbachi Cerón** (Colombia) said that Colombian regulations made no provisions for such methods solely because Colombia did not have enough experience with them. If transparency could be achieved through simple procedures, involving, for example, electronic communications and notifications, then there was no reason to disregard a useful method.

14. **Ms. Miller** (Observer for the World Bank) suggested replacing the term "corruption" with "lack of transparency". The World Bank would like to see the last sentence in paragraph 11 eliminated. Its assertion that some multilateral development banks might object to the use of requests for proposals with dialogue in projects financed by them was simply untrue.

15. **Mr. Grand d'Esnon** (France) agreed that the final sentence should be deleted. With regard to the additional language proposed by the Working Group, the best solution would be not to add that sentence at all.

16. **The Chair** took it that the Commission did not wish to adopt the proposed change in paragraph 11. In paragraph 12, which referred to the "capacity to negotiate", he thought that "capacity" might not be the best word choice.

17. **Mr. Fruhmann** (Austria) said that, in the context of negotiations, the proper term was "skills".

18. **Ms. Nicholas** (Secretariat) said that the secretariat would make sure that the appropriate term was used throughout the Model Law. She noted that the Working Group had decided to eliminate the last sentence in paragraph 17, according to which the experience of the multilateral development banks showed that putting in place the institutional frameworks and safeguards required for the chapter V procurement methods was among the most difficult reforms to implement, as the sentence did not reflect the banks' position.

19. **Ms. Miller** (Observer for the World Bank) and **Mr. Grand d'Esnon** (France) agreed that the sentence should be deleted.

20. **Ms. Nicholas** (Secretariat) drew the Commission's attention to the Working Group's suggestion that footnote 2 should contain a discussion of the usefulness and use of independent observers.

21. **Mr. Wallace** (United States of America), **Mr. Grand d'Esnon** (France) and **Mr. Fruhmann** (Austria) agreed with the suggestion, on the understanding that the term "probity officer" would not be used in the new footnote.

22. **The Chair** took it that the Commission approved the recommended changes to document A/CN.9/WG.I/WP.79/Add.10, except for the proposed addition in paragraph 11 of a reference to an elevated risk of corruption in the case of requests for proposals with dialogue. It understood the secretariat would review the document to ensure that the word "capacity" was replaced with a more appropriate term, as necessary, and that footnote 2 would not use the term "probity officer".

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

Chapter VI

23. **Ms. Nicholas** (Secretariat), turning to document A/CN.9/WG.I/WP.79/Add.13 on the Model Law's provisions on electronic reverse auctions, said that the Working Group recommended a number of changes in paragraph 12. First, the word "permitted" should be replaced by the word "required". Next, the paragraph should include a discussion of the potential advantages and limited benefits of requiring tender securities in electronic reverse auctions. It should also cross-refer to article 17 on tender securities. Elaborating on the Working Group's proposed text, she said that the paragraph should discuss how the combination of participating bidders and a vibrant, competitive market for something fairly standardized and easily available might make a tender security unnecessary and should encourage the procuring entity to ensure participation in the auction by making offers and requests attractive, rather than requiring participation, which would tend to elicit bad faith bids.

24. **Mr. Fruhmann** (Austria) said that paragraph 18 discussed how the common practice of using third-party entities to set up and administer electronic reverse auctions could lead to their overuse and abuse. However, third-parties entities could potentially provide administrative efficiencies, cost savings and process efficiencies. The text should explain that there were two sides to the coin.

25. **Ms. Nicholas** (Secretariat) said that the secretariat would revise paragraph 18 to ensure that it presented a balanced view.

26. **The Chair** took it that the Commission wished to adopt the changes agreed by the Working Group, as supplemented by the explanatory information provided by the secretariat, and on the understanding that paragraph 18 would be revised to provide a more balanced view of the role of third-party entities.

Chapter VII

27. **Ms. Nicholas** (Secretariat), responding to a comment by **Mr. Wallace** (United States of America) in reference to paragraph 6 of document A/CN.9/WG.I/WP.79/Add.15 on the Model Law's provisions on framework agreements, said that it should be made clear that framework agreements were not necessarily signed only with centralized purchasing agencies.

28. **Mr. Fruhmann** (Austria) noted that paragraph 6 did not mention that the combined effect of using framework agreements and electronic tools could make it difficult for small and medium enterprises, and even larger companies, to do business with country authorities. A discussion of that potential downside should be included somewhere in the Guide.

29. **Ms. Nicholas** (Secretariat) said that the two implementation-related issues raised by the representatives of Austria and the United States should be included, although perhaps not in paragraph 6, which was in the section on policy considerations. The secretariat would look carefully at the paragraph to ensure that it did not deal with issues best covered under implementation and use.

30. In paragraph 8, the Working Group proposed only editorial changes: replacing the "most advantageous submission, or lowest-priced submission, or equivalent" with the "successful submission", which was clearer, and ensuring language consistency in the various language versions of the Guide.

31. The Working Group had agreed that the second sentence of paragraph 30 should be revised to emphasize that the purpose of establishing a maximum duration was to avoid repeated extensions of closed framework agreements and to indicate that the maximum duration included the initial duration and any extensions, but not periods during which the framework agreement was suspended.

32. **The Chair** took it that the Commission approved the proposed changes to document A/CN.9/WG.I/WP.79/Add.15, as well as a clarification regarding the use of purchasing agreements with suppliers other than central purchasing agencies and a discussion of the potential for framework agreements to exclude companies from government contracts.

Chapter VIII

33. **Ms. Nicholas** (Secretariat) said that the proposed changes to document A/CN.9/WG.I/WP.79/Add.18 on the Model Law's provisions on challenge proceedings were essentially editorial. The secretariat was instructed to clarify the language of paragraphs 14, 23 and 30 by standardizing references to jurisdiction and to the wasting of time and costs, as well as by replacing "post-contract disputes" with "post-contract formation disputes" (para. 30) . Also, in the penultimate sentence of paragraph 23, "Thereafter" would be replaced by "After the contract formation period".

34. **The Chair** took it that the Commission approved the proposed changes to document A/CN.9/WG.I/WP.79/Add.18. It had thus finalized and adopted the portions of the draft Guide designated for priority consideration.

The meeting rose at 6 p.m.